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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

THE PEOPLE, Plaintiff and Respondent, v. ERIC CHARLES OLSON, Defendant and Appellant.	C063082 (Super. Ct. No. 07CR12057)

A jury convicted defendant Eric Charles Olson of one count of issuing a criminal threat (Pen. Code, § 422),[1] three counts of misdemeanor assault (§ 240), and one count of misdemeanor exhibiting a deadly weapon (§ 417, subd. (a)(1)). With enhancements for two prior serious felony convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and three prior prison terms (§ 667.5, subd. (b)), the trial court sentenced defendant to a state prison term of 28 years to life. Jail sentences for the misdemeanor convictions were ordered to run concurrently.

[1] Undesignated statutory references are to the Penal Code.

Defendant appeals, contending (1) insufficient evidence supports his conviction of issuing a criminal threat, (2) the trial court erred by failing to instruct on the lesser included offense of attempted criminal threat (§§ 664, 422), and (3) under section 654, the trial court should have stayed the sentences for defendant's convictions of assault and exhibiting a weapon (§§ 240, 417, subd. (a)(1)), committed against R.S.

We shall modify the judgment to stay the sentence for exhibiting a deadly weapon. (§ 417, subd. (a)(1).) In all other respects, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

During the early afternoon on February 9, 2007, 15-year-old R.S. was walking to a bus stop with his 13-year-old sister, E.R., and his 13-year-old friend, A.S. The minors were walking along Highway 88 near Pioneer, California, to catch a bus to church.

Defendant drove by in his pickup truck, honked his horn, and "flipped off" the minors. The minors had done nothing to provoke defendant, and R.S. had never before seen him. The minors crossed the road and continued to walk to the bus stop.

A few minutes later, defendant drove up from the rear, pulled onto the shoulder, and nearly struck R.S. and E.R. Defendant drove 30 to 40 miles per hour at the minors, and slammed on his brakes to slide to a stop. Had R.S. not stepped back and E.R. not run forward, they would have been hit by

defendant's truck. The truck separated R.S. from E.R. and A.S. by approximately 15 feet.

R.S. was standing next to the door used by defendant to get out of his truck. At his waist, defendant held in his hand a box cutter with an exposed three-inch blade. R.S. was only two to two and a half feet away from the knife. Defendant yelled at R.S., "Why didn't you tip your hat to me, you fucking nigger?" R.S. did not know what defendant meant and became scared.

R.S. testified that defendant said "right then he could slit my throat if he wanted to and that he knows where my family lives and he lives across the street from me and he can kill my whole family." Defendant was waving the box cutter back and forth in front of R.S. R.S. then testified:

"Q. And at that point in time, how did you feel?

"A. Scared.

"Q. Did you think [defendant] was serious?

"A. Yes.

"Q. And were you concerned for your safety?

"A. Yes.

"Q. What did you think [defendant] was going to do?

"A. Cut my throat."

Defendant called R.S. a "fucking nigger" again, then got in his truck and drove off.

R.S. could not recall how long the incident lasted because he was "really scared." E.R. testified that "about three minutes" elapsed between the time defendant stopped his truck and when he drove off.

R.S. recorded defendant's license plate as a contact on his sister's cell phone. The minors caught the bus to Jackson, where R.S. called his mother as soon as E.R.'s cell phone got reception. When R.S. told his mother what happened, she became afraid for him. R.S.'s mother did not report the incident to the police because she thought that they would take no action and defendant would kill R.S.

Two or three weeks later, R.S. saw defendant sitting on an ATV immediately next to the driveway of the house in which R.S. lived. Defendant looked at R.S., pointed two fingers toward his own eyes, and then pointed them toward R.S. R.S. was scared and called his mother. R.S.'s mother decided to report the incident to the police because defendant had shown up at their house.

The defense presented no evidence.

DISCUSSION

I. Sufficiency of the Evidence Regarding Sustained Fear

Defendant challenges the sufficiency of the evidence supporting his conviction of issuing a criminal threat. (§ 422.) Specifically, defendant challenges the sufficiency of the evidence that R.S. experienced sustained fear as a result of

defendant's threat to slit R.S.'s throat and to kill his family. We reject the contention.

A. Standard of Review

As the California Supreme Court has explained, "'In reviewing the sufficiency of evidence under the due process clause of the Fourteenth Amendment to the United States Constitution, the question we ask is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."' ([*People v.*] *Rowland* [(1992)] 4 Cal.4th [238,] 269, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [61 L.Ed.2d 560].) We apply an identical standard under the California Constitution. (*Ibid.*) 'In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' (*People v. Johnson* (1980) 26 Cal.3d 557, 576.)" (*People v. Young* (2005) 34 Cal.4th 1149, 1175 (*Young*).)

The testimony of a single witness suffices to support a factual finding unless the testimony is inherently improbable or physically impossible. (*Young*, *supra*, 34 Cal.4th at p. 1181.) When the evidence supports the conviction, we will not disturb the judgment even if the other evidence presented at trial might

have supported an acquittal. (*People v. Abilez* (2007) 41 Cal.4th 472, 504.)

B. The "Sustained Fear" Element

Section 422 prohibits the issuance of criminal threats. In pertinent part, the statute provides: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

Here, the record contains substantial evidence supporting the jury's conviction of defendant for issuing a criminal threat against R.S. The evidence showed that R.S. took defendant's threat seriously. R.S. testified that he actually thought defendant would cut his throat and became very scared. R.S. remained sufficiently afraid that he immediately called his mother as soon as E.R.'s cell phone got reception. R.S. communicated in such a manner that his mother immediately feared

for his life. The walk to the bus stop usually took 45 minutes, and the bus ride took an unspecified amount of time. This amount of time, in addition to the duration of the incident itself, sufficed to prove that R.S. experienced sustained fear as a consequence of defendant's death threat.

We reject defendant's contention that the evidence did not establish anything other than "momentary fear" during the incident. R.S.'s call to his mother—along with the immediate fear she developed when listening to her son—suffice to show that he remained fearful of defendant's threat. R.S.'s fear was more than fleeting and satisfied the fear element of section 422. (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1024.)

We also reject defendant's contention that R.S.'s recording of defendant's license plate and "continu[ing] on his way" indicated a calmness that was inconsistent with sustained fear. Section 422 does not require a victim to be so immobilized by fright that he or she is unable to function. The statute requires sustained fear, not paralysis. (§ 422.) As we have noted, R.S. took defendant's threat seriously and called his mother at his first opportunity. That R.S. continued on his way is unsurprising since he and the other minors had little choice other than to continue walking along the highway.

We are also not persuaded that R.S. indicated a lack of fear by calling his mother rather than the police. It is not surprising that a 15-year-old boy would call his mother

immediately after a traumatic event. His mother's apprehension about contacting the police suggested that the failure to report the incident was based on fear rather than repose. In short, the evidence sufficed to prove the fear element of section 422.

Defendant argues that we are compelled to reverse based on *People v. Allen* (1995) 33 Cal.App.4th 1149 (*Allen*), *In re Ricky T.* (2001) 87 Cal.App.4th 1132 (*Ricky T.*), and *People v. Fierro* (2010) 180 Cal.App.4th 1342 (*Fierro*). Each of these cases is readily distinguishable.

In *Allen*, *supra*, 33 Cal.App.4th at page 1156, the appellate court explained that "sustained" means a period of time that is not momentary, fleeting, or transitory. Thus, the *Allen* court affirmed a conviction for criminal threat when the evidence showed the victim was threatened by the armed defendant for 15 minutes until police arrested him. (*Ibid.*) More importantly, *Allen* did not hold that "sustained" fear requires the victim to suffer fear for a minimum period of 15 minutes.

Similarly, in *Fierro*, *supra*, 180 Cal.App.4th at pages 1348 to 1349, the appellate court affirmed a conviction for criminal threat upon a showing that the victim experienced 15 minutes of fear. As in *Allen*, the *Fierro* court did not hold that 15 minutes represented the minimum required to suffice for the sustained fear element of section 422. So long as the fear is more than momentary or fleeting, this element of section 422 is satisfied. (*Fierro*, at p. 1349.)

Even if 15 minutes were the necessary minimum for sustained fear under section 422, we would still reject defendant's contention. The evidence in this case establishes that R.S. experienced fear during the several minutes of the incident, which began with defendant driving his truck on the gravel shoulder toward the teenagers and nearly hitting them, and getting out of his truck and verbally threatening to kill R.S. and his family, after which the minors had to continue the 45-minute walk to the bus stop to catch the bus, and ride to Jackson. Such extended duration of fear suffices to meet the requirement of section 422 even if the minutes themselves cannot be precisely quantified on this record.

We find inapposite the case of *Ricky T.*, in which "there was nothing to indicate that the [victim's] fear was more than fleeting or transitory. Indeed, [the victim] admitted the threat was not specific." (*Ricky T.*, *supra*, 87 Cal.App.4th at p. 1140.) By contrast, the victim in this case testified that he actually believed that defendant was going to cut his throat. Moreover, defendant was very specific in threatening the death of R.S. as well as his "whole family." *Ricky T.* thus lends defendant's argument no support.

The evidence adduced at trial sufficed to establish that R.S. experienced sustained fear within the meaning of section 422. The trial court did not err in denying defendant's motion for new trial based on insufficient evidence. And,

defendant's right to a fair trial was not undermined by insufficient evidence of the criminal threat.

II. Failure to Instruct on the Lesser Included Offense of Attempted Criminal Threat

Defendant argues that the trial court erred in failing to instruct sua sponte on the lesser included offense of attempted criminal threat. In so arguing, defendant reiterates his contention that the evidence of R.S.'s sustained fear was "simply not present in the present case." We are not persuaded.

A. Standard of Review

A trial court has a duty to instruct the jury on any offense "necessarily included" in the charged offense if substantial evidence lends support for the lesser crime's commission. (*People v. Birks* (1998) 19 Cal.4th 108, 112.) As the California Supreme Court has explained, "a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*Id.* at pp. 117-118.) "This venerable instructional rule ensures that the jury may consider all supportable crimes necessarily included within the charge itself, thus encouraging the most accurate verdict permitted by the pleadings and the evidence." (*Id.* at p. 112.)

Even in the absence of a request for an instruction on the lesser included offense, the trial court must give the instruction if a reasonable jury might find the evidence of the

lesser offense persuasive. (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) However, "the court 'has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction.'" (*People v. Cole* (2004) 33 Cal.4th 1158, 1215 (*Cole*), quoting *People v. Cunningham* (2001) 25 Cal.4th 926, 1008.)

In assessing a claim of failure to instruct on a lesser included offense, "we review independently the question whether the trial court failed to instruct on a lesser included offense." (*Cole*, *supra*, 33 Cal.4th at p. 1215.)

B. Evidence of Element of Fear

Attempted criminal threat is a lesser included offense of criminal threat. (*People v. Toledo* (2001) 26 Cal.4th 221, 226, 230.) In *Toledo*, the California Supreme Court explained that a person commits an attempted criminal threat "if a defendant, . . . acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat." (*Id.* at p. 231.) Defendant contends that the evidence that R.S. experienced sustained fear was lacking so that the trial court had a duty to instruct sua sponte on attempted criminal threat.

As we explained in part I.B., R.S.'s testimony satisfied the sustained fear element of section 422. R.S. described his intense fear during the threatening episode. The evidence further showed that R.S.'s fear continued at least until he was able to call his mother upon arriving in Jackson. Thus, R.S. endured fear of defendant for "a period of time that extend[ed] beyond what is momentary, fleeting, or transitory." (*Allen*, *supra*, 33 Cal.App.4th at p. 1156.) The evidence regarding the element of fear was not sufficiently weak to require the trial court to instruct on attempted criminal threat.

C. No Evidence of Attempted Criminal Threat

We would affirm the judgment even if the trial court had erred in failing to instruct on attempted criminal threat because it is not reasonably probable that a result more favorable to defendant would have occurred. (*People v. Breverman* (1998) 19 Cal.4th 142, 178.) The evidence did not support a conclusion that R.S. had been threatened but that he did not actually experience sustained fear as a result.

Defendant's theory at trial was that the minors had fabricated the entire account of the encounter on Highway 88. Defense counsel's closing argument focused on portraying defendant as lacking any motive to confront and threaten R.S. The jury was asked to reject the entirety of the minors' testimony. The evidence did not allow for a conviction for attempted criminal threat. Accordingly, the trial court did not err in failing to instruct on the lesser included offense.

III. Section 654

Defendant contends the trial court erred in sentencing him to concurrent terms for the misdemeanor offenses committed against R.S., i.e., assault (§ 240) and exhibiting a weapon (§ 417, subd. (a)(1)). Relying on section 654, defendant contends the trial court should have stayed the sentences for these offenses.[2] We agree that defendant's sentence for exhibiting a weapon must be stayed. However, we reject his argument as to the count for misdemeanor assault against R.S.

A. Standard of Review

Subdivision (a) of section 654 provides, in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Section 654 prohibits multiple punishments for a single act or indivisible course of conduct. (*People v. Hester* (2000) 22 Cal.4th 290, 294.) "The purpose of this statute is to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime. Although . . . distinct crimes may be charged in separate counts and may result in multiple verdicts of guilt, the trial court may impose sentence

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[2] Defendant does not argue that the sentences for misdemeanor assaults on the other victims, E.R. and A.S., should be stayed.

for only one of the separate offenses arising from the single act or omission—the offense carrying the highest punishment. (*Neal v. State of California* (1960) 55 Cal.2d 11, 18-21 (*Neal*).)" (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312 (*Hutchins*).)

As the California Supreme Court has explained, "'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.'" (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507, quoting *Neal*, *supra*, 55 Cal.2d at p. 19, italics omitted.)

In reviewing whether the trial court erred in failing to apply section 654 to a case involving multiple punishments, we are mindful that "the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them." (*Hutchins*, *supra*, 90 Cal.App.4th at p. 1312.)

B. Defendant's Course of Conduct

Defendant asserts that his encounter with R.S. on February 9, 2007, constituted an indivisible course of conduct within the meaning of section 654.

Although defendant scared R.S. from the beginning to the end of the confrontation on the highway, his course of conduct was not indivisible. Defendant first scared R.S. by nearly

hitting the minor with his truck. Had R.S. not taken evasive action, he would have been hit.

Defendant next sought to denigrate R.S. by calling him a "fucking nigger" and yelling at the minor about failing to tip his hat when defendant drove by. Finally, defendant threatened to kill R.S. and his family. R.S. feared that defendant would actually carry out the threat to slit his throat.

Although defendant's actions toward R.S. on February 9, 2007, might be summarized as a course of conduct to scare the minor, the possibility of a single broad description of criminal activity is not conclusive under section 654. (*People v. Lochmiller* (1986) 187 Cal.App.3d 151, 153.) Defendant's driving toward R.S. with his truck was distinctly different than his denigration of the minor with a racial epithet and the threat of violence against R.S. and his entire family. As opposed to the assault with the truck, defendant's criminal threat sought to belittle R.S. by insulting him and causing him to fear for his and his family's safety. The trial court did not err in failing to stay the sentence of misdemeanor assault because of the distinct characteristics of the assault with the truck and the subsequent criminal threat.

However, the trial court did err in failing to stay defendant's sentence for exhibiting a weapon (§ 417, subd. (a)(1)) because the box cutter was displayed at the same time and with the same intent as the criminal threat (§ 422).

The Attorney General concedes the error, and we accept the concession.

The singular objective of exhibiting a weapon to make a criminal threat requires that the sentence for the misdemeanor exhibiting a weapon be stayed under section 654. We shall order defendant's sentence modified accordingly. (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1473-1474.)

DISPOSITION

The judgment is modified to stay the sentence for misdemeanor exhibiting a weapon pursuant to section 654. Accordingly, defendant's 90-day jail sentence for violating section 417, subdivision (a)(1) (count IV) is stayed pending service of his state prison sentence, such stay to become permanent upon completion of the prison sentence. Defendant's prison sentence remains 28 years to life for the criminal threat and sentence enhancements. Defendant's convictions are affirmed. As modified, the judgment is affirmed. The trial court is directed to prepare amended minutes of the felony sentencing reflecting the modification.

BUTZ, J.

We concur:

NICHOLSON, Acting P. J.

MAURO, J.